U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 April 2003

CASE NOS.: 2001-LHC-1635/1636

OWCP NOS.: 01-147392/01-147393

In the Matter of

ALAN L. GREEN
Claimant

v.

ELECTRIC BOAT CORPORATION
Self-Insured Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Carolyn P. Kelly, Esquire (O'Brien, Shafner, Stuart, Kelly & Morris),
Groton, Connecticut, for the Claimant

Edward W. Murphy, Esquire (Morrison, Mahoney & Miller),
Boston, Massachusetts, for the Employer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS AND SPECIAL FUND RELIEF

I. Statement of the Case

This proceeding arises from a claim for worker's compensation benefits filed by Alan L. Green (the Claimant) against the Electric Boat Corporation (the Employer) under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the Act). After an informal conference before the District Director of the Department of Labor's Office of

Workers' Compensation Programs (OWCP), the matter was referred to the Office of Administrative Law Judges for a formal hearing which was conducted before me in New London, Connecticut on December 6, 2001. The hearing afforded all parties an opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. The Director, OWCP did not appear, having advised by letter dated November 2, 2001 that it had received notice of the Employer's application for Special Fund Relief pursuant to 33 U.S.C. §908(f) and did not wish to participate in the hearing. ALJX 13.[1] The Claimant and the Employer's vocational expert, Jessica Corneau, testified at the hearing, and documentary evidence was admitted without objection as Claimant's Exhibits CX 1-59 and Employer's Exhibits RX 1-57. TR 7-10, 46, 58. At the close of the hearing, the record was held open to afford the parties an opportunity to offer copies of exhibits that were admitted at the hearing, a medical report from the Employer's expert and evidence by the Claimant to rebut the Employer's last addendum to its labor market survey evidence (RX 56). TR 106. Within the time allowed, the following documents were submitted:

Report of A. Louis Mariorenzi, M.D., dated January 10, 2002	RX 58
Report of Carl Barchi, M.Ed., CDMS, Vocational Specialist, dated December 12, 2001	CX 60

No objection was raised to the post-hearing evidence, and these exhibits have been admitted. Both parties waived submission of written closing argument, and the record is now closed.

After careful analysis of the evidence contained in the record, I conclude that Claimant is entitled under the Act to an award of permanent total and permanent partial disability compensation with interest, medical care and attorney's fees. I further conclude that the Employer is entitled to Special Fund relief as well as a credit for past voluntary compensation payments. My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

The parties have offered the following stipulations:

(1) the Claimant sustained injuries to his left knee on April 22, 1997 and to his back on January 13, 1999;

(2) these injuries occurred at the Employer's facility in Groton, Connecticut;

(3) the parties are subject to the Act;

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[1] Documentary evidence will be referred to herein as "CX" for an exhibit offered by the Claimant, "RX" for an exhibit offered by the Employer and "ALJX" for the formal papers. References to the hearing transcript will be designated as "TR".

(4) an employer/employee relationship existed at the time of each of the injuries;

(5) the injuries arose in the course and within the scope of employment;

(6) notices and claims were timely filed;

(7) the date of the informal conference was February 14, 2001;

(8) disability resulted from the injuries;

(9) medical benefits have been paid for the injuries, amounting to approximately $27, 832.27 for the knee injury and $1,608.00 for the back injury, as provided by the Employer;

(10) the Employer has been paying temporary total disability compensation to the present time, at a compensation rate of $601.45, based on an average weekly wage of $909.68, totaling $75,199.30;

(11) the proposed date of maximum medical improvement with respect to the knee injury is November 3, 2000; and,

(12) the Claimant has not returned to his regular employment since July 16, 1999.

TR 10-12. The parties further agreed that the unresolved issues presented for adjudication are: (1) the nature and extent of the Claimant's disability; (2) the average weekly wage[2]; and, (3) whether the Employer is entitled to Special Fund Relief pursuant to section 8(f) of the Act. TR 11-12.

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant, Alan L. Green, was born on July 8, 1949 and was 52 years old on the day of the hearing. TR 19. He graduated from high school in 1968, served in the Navy for about 18 months where he drove heavy equipment, and then took courses at Olney Central College, in Olney, Illinois for about three years, receiving a two-year certificate in welding technology. TR 19-20.

[2] At the hearing, counsel for the Claimant stated informed me that there may have been a prior agreement between the parties with respect to average weekly wage and that she would check into it and report back. Since no further stipulation has been offered, the average weekly wage issue will be addressed herein.

In June of 1973, the Claimant started working at the Employer's facility in Groton, Connecticut as a welder, and throughout his employment there, he also worked as a grinder, inspector, fitter, cleaner and painter. TR 21. He sustained the first work-related injury to his left knee in the 1980's, but did not miss any work. TR 21-22. He also underwent back surgery for a pinched nerve in 1992 as a result of a workplace injury. TR 21-22. He testified that after the surgery, he occasionally experienced back problems, but he continued performing his regular work activities and did not have any additional back surgery. TR 22-23.

Regarding the stipulated left knee injury on April 22, 1997, the Claimant testified that he was having problems with his knee "coming out of joint" when he was twisting it. TR 23-24. He stated that he reported the injury to the Employer's Yard Hospital and sought treatment from Dr. Elliot in Westerly, who took a CAT scan, found torn cartilage and prescribed a leg brace. TR 24. He added that he also took Tylenol and aspirin for the pain. TR 24. After Dr. Elliot's retirement, the Claimant treated with Dr. Gross, who prescribed an elastic band for his knee. TR 25. He testified that he was not satisfied with Dr. Gross's treatment because he continued to have problems with pain, his knee locking up, cartilage popping out between the joint and difficulty walking correctly. TR 25-26. Because of these continued problems, he consulted with Dr. Irving, who advised him that the frequent kneeling required for his job was causing his knee problems. TR 26-27.

The Claimant testified that around 1997, he was working in the reactors in the South Yard, which required frequent climbing, crawling on steel and kneeling. TR 27. After consulting with Dr. Irving, he returned to Dr. Gross and convinced him to assign restrictions. TR 27-28. Afterwards, he was out of work for a period of time and then was placed on light duty assignment. TR 29. He testified that at some point during his light duty assignment, his restrictions were changed without his involvement and he was required to go back to work on the boats. TR 29-30. He stated that his last position with the Employer was sweeping, although he was classified as a welder. TR 31.

Regarding his other medical problems, the Claimant testified that in 1998 and 1999, he was diagnosed with carpal tunnel syndrome and experienced problems with numbness, cramping and his hands feeling cold. TR 28. He stated that he had used a burr machine and grinding machines daily while he worked for the Employer. TR 28. He further testified that also during this time, he was diagnosed with arthritis in the ankles caused by the walking, crawling and prolonged standing required by his job. TR 28-29. Dr. Lawrence, a podiatrist in Westerly, prescribed orthotics for his arthritis, which involved tightening his shoes. TR 29. The Claimant also stated that he treats with Dr. Puppi for asthma and, while he has not received any restrictions, Dr. Puppi told him not to work around dust and smoke. TR 40. He stated that he takes Vioxx for inflammation and another medication he could not pronounce, in addition to inhalers and two medications for asthma and vitamin B6 for carpal tunnel syndrome. TR 41-42.

The Claimant testified that around the time when his restrictions were changed, he reached an agreement with the Employer to receive treatment for all of his injuries from the same doctor,

Dr. Gaccione. TR 31. Dr. Gaccione reinstated the work restrictions and recommended knee surgery, which was performed in February 2000. TR 31-32. Prior to working for the Employer, the Claimant had undergone knee surgery to remove his kneecaps at the VA Hospital in St. Louis, Missouri,. TR 33. He stated that after the February 2000 surgery, he still experienced problems with his knees locking after standing continuously for twenty to thirty minutes. TR 35-36.

Regarding the stipulated back injury on January 13, 1999, the Claimant testified that he slipped and fell on some ice and injured his back and right hip. TR 36-37, 39. He treated with a chiropractor, Dr. Siciliano who tried to put the hip back in place and improve the functioning of his right leg, which had developed problems as a result of being favored because of his left knee condition. TR 37-38. On November 3, 2000, Dr. Gaccione gave the Claimant some work restrictions, but the Employer did not have any light duty positions for him, but he was being actively treated for his back and right hip. TR 38-40. At the time of the hearing, the Claimant had an appointment in January 2002 to check his left knee and hip and to determine the need for joint replacement for his hip. TR 53.

The Claimant testified that because of his ankles, knees and back, he can only stand comfortably for thirty minutes. TR 41. He can sit comfortably on a hard chair for about thirty minutes before he experiences numbness in his buttocks because of the hip and lower back problems. TR 41-42. He can also walk comfortably for about twenty to thirty feet on a flat surface. TR 42. He stated that he sleeps about eight to twelve hours at night, but wakes up every couple of hours because of his hip pain. TR 53-54.

The Claimant testified that he could not return to his usual work as a welder because of the injuries to his hands, knees and back and because of exposure to smoke. TR 43. He stated that in October 2001, he received a copy of a labor market survey performed by the Employer's vocational expert, Jessica Corneau. TR 43. He stated that he checked into the jobs on the survey and had looked for employment at Garrity Industries and Yardley prior to receiving the survey. TR 43-44. He stated that he filled out an application with Michael Partridge at Blackstone Valley Security and also at Sheffield Lab, but they subsequently sent him a letter stating that there was no work for him. TR 44-45. He testified that he also filled out applications at Plas-Pak, George C. Moore, Davis Standard and Staffing Consultants. TR 46-48. He added that he went to Atlantic Security in Norwich, but noone was at the location. TR 48-49. Regarding a job listed in the survey at Ashaway Line and Twine Company, the Claimant testified that his wife had previously worked there and had developed a breathing problem from dust and chemical exposure. TR 49. He also stated that he had visited the Ashaway Company himself and would have difficulty working there because of the dusty environment. TR 49-50. Similarly, he stated that he did not apply for a job at Foxwoods Casino because he had visited the Casino before and observed the smokey environment and the need for telephone operators and desk receptionists to perform a lot of walking. TR 51-53.

On cross-examination, the Claimant admitted that he visited the employers identified in the labor market surveys fairly recently and in preparation for the hearing and that he had not looked

for work until that time. TR 54-56. He stated that he had used a document to refresh his memory about his recent job search activities, which was completed as he conducted his search, and was admitted into evidence as RX 57. TR 57-58. Regarding the knee injuries sustained prior to working for the Employer, the Claimant testified that the Veteran's Administration had denied benefits based on its position that the injury occurred before his service. TR 59-60. However, he stated that he had received a medical discharge based on his knee condition. TR 60-61. He received a B or C average at Olney College and took courses in Math and English, as well as welding technology, and did not receive his degree because of a problem with a chemistry course. TR 61-62. He took training courses when he was working for the Employer in inspection, blueprinting and RadCon radiation. TR 63. He stated that he had used the computer once a month towards the end of his employment to input inspection notes and had taken a course to enable him to complete that function. TR 63-64. He owns a computer for e-mail use and to check his stocks. TR 64-65. He stated that he has some problems on the telephone because of an approximately twenty percent hearing loss. TR 65.

He admitted that he could walk more than twenty or thirty feet and that he also performs some yard work, including mowing his lawn, which is 20 by 20 feet in the front and 30 by 30 feet in the back, but he does not do any raking. TR 67-68. He also stated that he does cleaning and organization work in his garage, runs errands once or twice a week and performs housework activities, such as laundry, vacuuming and cleaning. TR 69-70. He stated that he obtained a new vehicle that is smaller and has heated seats because of his medical problems. TR 70. He admitted that in May of 2000, he helped his son's girlfriend move out of her fourth-floor apartment, but he stated that he stood around most of the time. TR 70-71. He also stated that he has a five percent impairment rating in each hand due to carpal tunnel syndrome. TR 71. He acknowledged that he is about 100 pounds overweight and has smoked cigars for about 20 years. TR 71-72.

On redirect examination, the Claimant testified that the courses in inspection and blueprinting were both two days in length and the RadCon radiation course lasted one week. TR 72-73. He stated that he quit smoking because of his breathing problems around the time he began receiving compensation. TR 73.

B. Medical Evidence

Records from the Employer's Yard Hospital confirm that the Claimant sustained on-the-job injuries to his left knee in 1982 and his back in 1991. CX 1; CX 6; RX 37; RX 40. Records from Henry Brown, M.D. and Lawrence and Memorial Hospital show that he underwent surgery for a herniated lumbar disc on January 28, 1992 and received subsequent treatment and physical therapy. CX 7; CX 9; CX 11. By letter dated January 18, 1993, Dr. Brown reported that the Claimant had reached maximum medical improvement and gave him a rating of 15% permanent partial disability of the lumbar spine. CX 13; RX 7 at 1. Treatment notes from A. John Elliot, M.D., from September of 1993 show that the Claimant sought treatment for continued knee problems and that he reported nearly falling off the boat because his knee was "giving way." CX 14; RX 6 at 3-4. By letter dated January 19, 1994, Dr. Elliot gave the Claimant a 20% permanent

partial impairment rating of the lower extremity due to the 1982 injury and recommended that he refrain from working on boats and in high places because of the potential instability of his knee. CX 16; RX 10.

The medical records next show that the Claimant was evaluated by Philo F. Willetts, Jr., M.D., on April 21, 1994 for left knee pain. CX 17; RX 11. In a report to the Employer dated April 21, 1994, Dr. Willetts opined that the Claimant's knee condition was at that time the result of a combination of his 1982 work-related injury, a new injury in 1993 and his earlier knee pathology, which had resulted in a medical discharge from the Navy in 1969 and a patellectomy in 1972. CX 17 at 4; RX 11 at 4. He stated that the Claimant's self-imposed avoidance of squatting and kneeling was reasonable and that he should also avoid climbing high vertical ladders but could otherwise work without restriction. *Id.* In a follow-up report dated June 17, 1994, Dr. Willetts assigned the Claimant a 22% permanent partial impairment of the left lower extremity due to the patellar removal and a 11% permanent partial impairment of the left lower extremity related to the 1982 injury. CX 18; RX 12.

Treatment notes from Stephen B. Gross, M.D., show that he treated the Claimant initially on October 24, 1994 and after the stipulated left knee injury, from April 22, 1997 until October 8, 1998. CX 22; RX 5. He prescribed anti-inflammatory medication and was not comfortable recommending knee replacement surgery. *Id.* On January 21, 1999, the Claimant sought a second opinion about his left knee from J.F. Irving, M.D., who recommended that knee replacement surgery would not alleviate his symptoms and recommended the Claimant change occupations. CX 24; RX 52.

On February 1, 1999, the Claimant was referred to the Norwich Rehabilitation Center for evaluation and treatment of his low back because of a history of lower back surgery and a recent slip and fall. CX 26. On February 4, 1999, Dr. Gross assigned work restrictions related to the knees to avoid crawling, kneeling or climbing for one year. CX 27. The Yard Hospital records show that Dr. Gross was contacted on February 9, 1999, and he advised that limited ladder climbing would be a fair restriction. CX 28. Subsequently, on February 23, 1999, the work restrictions were again changed to include no climbing. CX 32.

On April 9, 1998, Dr. Willetts diagnosed the Claimant with probable bilateral carpal tunnel syndrome and synovitis in his left ankle and advised him to use a good arch support and modifications of heel height for the ankle problems and wrist splints and vitamin B6 for his hands. CX 23; RX 2. At a follow-up appointment on June 29, 1998, Dr. Willetts assigned a 5% permanent partial impairment of both hands compatible with upper extremity neuropathy, but he reported that he did not see any indications of carpal tunnel syndrome. RX 2 at 3-4.

In a follow-up appointment on February 18, 1999, after the stipulated back injury, Dr. Willetts opined that "[the Claimant's] back problem would not prevent him from working" and that there was no indication for surgery with regard to his hands, left ankle or back. CX 29; RX 2 at 8-9. At another follow-up evaluation on March 1, 1999, where the Claimant reported difficulty with his back after prolonged sitting in a welding class, Dr. Willetts provided restrictions of no

prolonged sitting for greater than one hour at a time or four hours per day and no more than six hours per day of standing, no lifting over 20 pounds, no pushing/pulling over 50 pounds, and he suggested a back support and modified height for the Claimant's welding platform. CX 33; CX 34; RX 2 at 10-11; RX 42.

Medical records from Leon Puppi, M.D., show that he has treated the Claimant since November 1999 for bronchial asthma and possible Reactive Airways Dysfunction Syndrome (RADS) which he attributed to high dose exposure to irritants. CX 58. In a letter to Claimant's counsel dated February 17, 2000, Dr. Puppi reported the Claimant's statements that his symptoms were triggered by exercise, exposure to smoke, perfumes, aerosol products and other irritants. CX 58 at 4. In addition, Dr. Puppi stated that the Claimant's exertional dyspnea may be due in part to his morbid obesity. *Id.* He determined that it would be difficult to diagnose RADS due to the presence of symptoms for at least a year and possibly longer, but that the treatment for asthma was similar. *Id.* Dr. Puppi prescribed an asthma protocol, and on October 2, 2001, he reported that the Claimant "has been doing very well over the last six months with minimal symptoms and is very compliant with his asthma regimen." *Id.* at 17.

The record next shows that the Claimant began treatment with Daniel R. Gaccione, M.D., on April 7, 1999 for his left ankle problems, knee pain and chronic low back pain. CX 39; RX 3. On April 7, 1999, Dr. Gaccione assigned restrictions to avoid kneeling, crawling or climbing, and his office note indicates that he intended to make the restrictions permanent, but the Claimant insisted on a six-month duration. CX 37; CX 38; CX 39; RX 3. His plan for the Claimant was to evaluate the possibility of future knee replacement surgery and the application of work restrictions and an ankle brace. CX 39; RX 3.

The Claimant continued to treat with Dr. Gaccione for his ongoing knee complaints and eventually underwent total knee arthroplasty surgery on February 28, 2000. CX 40; CX 41; CX 42; CX 43; CX 45; CX 47; CX 49; CX 50; RX 3. On May 3, 2000, Dr. Gaccione reported that the Claimant was proceeding well with physical therapy for his knee and that the focus of his complaints had shifted to his back and ankle. CX 51 at 2; RX 3. He reported that the Claimant was capable of some light duty work. CX 51 at 2; RX 3. Physical therapy treatment notes dated May 30, 2000 document the Claimant's statements that he helped move his son's girlfriend out of her fourth floor apartment during the previous weekend. RX 55. On August 4, 2000, Dr. Gaccione recommended alternative therapy such as massage for the back problems because previous physical therapy had not been successful. CX 51 at 3; RX 3. By letter to Claimant's counsel dated August 30, 2000, Dr. Gaccione predicted that the Claimant would reach maximum medical improvement following the knee surgery by the time of an upcoming evaluation scheduled for November 2000. CX 52; RX 4. His office notes for November 3, 2000 show that the Claimant's left knee was "doing fairly well" and that his chief complaint concerned his back, for which he was receiving intermittent chiropractic care. CX 55; RX 3. Dr. Gaccione continued to treat the Claimant for chronic low back pain in 2001. CX 56; RX 3. The most recent work restrictions assigned by Dr. Gaccione, dated October 5, 2001, are to avoid bending, squatting/stooping, crawling, climbing/heights, kneeling, twisting, walking more than 1-2 hours, standing more than 1-2 hours, lifting over 10 pounds and pushing/pulling over 25 pounds. CX 57.

At this time, Dr. Gaccione indicated that the Claimant needs vocational rehabilitation and training and does not indicate that he has reached maximum medical improvement. *Id.*

The Employer introduced two reports by its medical expert, A. Louis Mariorenzi, M.D. The first report, dated October 16, 2000, shows that he evaluated the Claimant on October 10, 2000, took an oral medical history and reviewed x-rays of the left knee. RX 9 at 1-3. He did not review any of the Claimant's other medical records. In this report, Dr. Mariorenzi opined that the Claimant had reached maximum medical improvement from the February 2000 knee surgery. *Id.* at 3. He gave the Claimant a 37% permanent partial impairment for the left lower extremity and a corresponding 15% permanent partial impairment of the whole person. *Id.* Regarding the back condition, Dr. Mariorenzi reported,

> Although the patient has subjective complaints with reference to his lower back, his physical findings at the present time are noted to be entirely within normal limits. His history fails to indicate any injuries to the lower back at the time of his recent occupational accident. At the time of this evaluation there is no evidence of any residuals of acute injuries to the lower back.
>
> The patient has had previous back surgery in 1992. He states that this was the result of an occupational injury. From this back surgery he has made a satisfactory recovery and he does have an 8% permanent partial impairment of his lower back. There is nothing in the medical records that I have reviewed or the history obtained from the patient that would indicate he has any particular problem with his lower back resulting from his recent April 1997 occupational injury. It is my opinion that further physical therapy to cure, relieve or rehabilitate him is not necessary. MMI has been reached.

Id. at 3-4. Dr. Mariorenzi opined that the Claimant would not be capable of performing a job as a welder and provided work restrictions of no crawling, excessive climbing, kneeling or squatting. *Id.* at 4.

In a subsequent report dated January 10, 2002, Dr. Mariorenzi indicated that he conducted an extensive medical records review with regard to the Claimant's knee, back and other medical problems. RX 58. He summarized the Claimant's longstanding history of low back pain and knee problems, in addition to citing the problems with the Claimant's hands, right hip, left ankle and right foot, as well as "evidence of early pulmonary obstructive disease possibly due to asbestosis." *Id.* He opined that for the back condition, the Claimant had reached maximum medical improvement as of his October 2000 evaluation. *Id.* Additionally, Dr. Mariorenzi stated that "it is my opinion with probable medical certainty that Mr. Green's previous knee problems, his present arthritic and pulmonary problems combined with his occupational injuries make his present disability materially and substantially greater." *Id.*

C. Vocational Evidence

The Employer introduced a labor market survey conducted by its vocational expert, Jessica Corneau, MA, CRC, Case Manager, Concentra, dated October 31, 2000 (RX 1-B), and updated reports, dated February 16, 2001 (RX 1-D), August 22, 2001 (RX 1-C) and October 29, 2001 (RX 56). In her October 29, 2001 report, Ms. Corneau identified the following jobs as available within 30-40 miles of the Claimant's home:

(1) Full-time security guard positions available throughout Rhode Island, with Blackstone Valley Security, to provide property surveillance and/or monitor people/customers entering or leaving property with possibility of driving vehicles to provide surveillance if valid driver's license, no experience required, criminal background check, salary: $6.50 - $11.00 per hour (1997 equivalent $5.75-$9.73/hour);

(2) Full-time and part-time security guards and traffic safety officers for positions through Southeastern and Central Connecticut, with Ace Security, no experience required, no felony convictions, salary: $6.75-$9.00 per hour (1997 equivalent of $5.75-$7.67 per hour);

(3) Full-time and part-time security guards for positions in Groton, Connecticut and throughout Rhode Island, with Pinkerton Security, experience preferred and criminal background check, salary $8.50 per hour (1997 equivalent $7.24/hour);

(4) Full-time and part-time security guards throughout Rhode Island, with U.S. Securities, no experience required, no felony convictions, salary $7.00-$8.00 (1997 equivalent $5.96-$6.82/hour);

(5) Full-time and part-time greeters in Westerly, Rhode Island, with Wal-Mart, involves verbally greeting customers as they arrive, assisting in finding departments, and occasionally pushing carriages inside store, salary $6.75 per hour (1997 equivalent $5.75/hour); and,

(6) Full-time and part-time security guards throughout Rhode Island, with Professional Security, no experience required and criminal background check, salary: $7.00-$7.50 per hour (1997 equivalent $5.96-$6.64/hour).

RX 56. The labor market surveys also indicate that the Blackstone Valley Security positions were available as of October 31, 2000 (RX 1-B; RX 1-C; RX 1-D), the Ace Security and Pinkerton Security positions were available as of February 16, 2001 (RX-1-C; RX 1-D), and the U.S. Securities and Wal-Mart positions were available as of August 22, 2001 (RX 1-C).

In addition, Ms. Corneau testified at the hearing. She stated that she was a certified rehabilitation counselor and was first referred the Claimant's case in October of 2000. TR 75-76, 79. She further testified that in preparation for writing her reports, she reviewed medical records from the treating physicians and Dr. Mariorenzi, the Claimant's deposition and the parties' trial

exhibits, in addition to interviewing the Claimant on October 24, 2001. TR 79-80; RX 56. She opined that the Claimant had an earning capacity and based this opinion most significantly on the Claimant's long work history with one company, his receipt of a two-year certificate from a welding school and the work restrictions assigned by the doctors, including Dr. Gaccione, which indicated a work capacity. TR 81.

Ms. Corneau testified that prior to writing her latest report dated October 29, 2001, she interviewed the Claimant and learned that he was asthmatic and that dust and smoke exacerbated his symptoms. TR 85. She stated that she then contacted the employers listed in the August 22, 2001 report by telephone to determine if their positions were still appropriate for the Claimant given this information about his asthma. TR 85. With regard to the security positions, she stated that the companies indicated that they receive requests for security guards within office or corporate environments, and not just manufacturing environments where the Claimant might be exposed to dust or smoke. TR 86. She also stated that she has observed individuals performing the job of a greeter at Wal-Mart in Westerly, Rhode Island, and a security guard in an office environment working for Professional Security. TR 86-87. She indicated that the positions in the October 29, 2001 report were within the Claimant's physical restrictions and were open and available at the time of the report. TR 87.

Ms. Corneau stated that it is her opinion that the Claimant had a realistic chance of obtaining the positions identified in the October 29, 2001 report. TR 89. She explained that,

> Based on my conversations with these employers, at the time they were looking for people. When I asked specifically in terms of physical requirements, the information I obtained was that there would be positions available, and that they would try to match him with what he was able to do physically, particularly the security companies placing him in a front desk or a gate-type position as opposed to somebody that would require patrolling around an environment.
>
> But also because he's got a solid work history, probably has good work habits. He worked for, you know, one company for over 20 years. So a lot of employers at this point are saying they, along with if they've got requirements for a high school diploma or whatever the prerequisite qualifications may be, they need to know that someone is going to be there when they are scheduled to be there or knows enough to call with enough notice that they can get someone else to fill the position. So someone with an established work history, of some success in working for an employer is generally considered a positive thing.

TR 89-90. Ms. Corneau was asked if the Claimant's testimony about his experiences with certain employers was consistent with her experiences with these employers. TR 91. She reviewed the form prepared by the Claimant of his job search activities (RX 57) and stated that only one of those employers was listed in her October 29, 2001 report; namely, Blackstone Valley Security. TR 91-92. She also noted that the Claimant only applied at Blackstone Valley Security on December 4, 2001, just two days before the hearing, so that it was possible that the employer

simply had not gotten a chance to contact him yet. TR 92. Ms. Corneau reviewed her first report of October 31, 2000 (RX 1-B) and expressed an opinion that the Claimant had a work capacity as of that date because one of the employers, Blackstone Valley Security, had appropriate positions for the Claimant at that time. TR 94-95. With regard to her February 16, 2001 report, Ms. Corneau indicated that positions with Sheffield Labs, Ashaway Line and Twine, Foxwoods and Plainfield Greyhound would not be appropriate because of the presence of dust and smoke, but she maintained that the other positions in her report would still have been appropriate for the Claimant. TR 95-96.

On cross-examination, Ms. Corneau testified that Blackstone Valley Security had "a variety of positions available at any given time." TR 98-99. However, she could not identify any specific positions at a particular company and could not guarantee that the security firms would have continuous employment in a job site that would accommodate all of the Claimant's restrictions. TR 99. She admitted that some of the available positions with Blackstone Valley Security could be temporary. TR 99. She added that none of the security firms identified a specific building or job site that was available. TR 100. Regarding the Wal-Mart greeter position, Ms. Corneau testified that the employer would permit use of a chair as a reasonable accommodation to permit the greeter to sit or stand as needed. TR 101-102.

Ms. Corneau further testified that the break in the Claimant's employment did not alter her opinion that the Claimant's longstanding work history would be attractive to a prospective employer. TR 102-103. Regarding the Claimant's employability, Ms. Corneau stated,

> I think in the real world, there are some employers who where yes, that would impact their decision. These employers that I've listed here, the employers that I generally get a positive response to, who take the time to discuss with me the physical requirements of positions, you know, who emphasize to me that they're looking for people who've got some work history, I think that based on that information, that these particular jobs that are identified and these particular employers, that no they would not see that – use that in any way as a negative – to make a negative decision about hiring him.

TR 103-104. However, Ms. Corneau clarified that the employers had not been specific about the people with disabilities who were hired. TR 104. Regarding keyboard skills required for the security positions, Ms. Corneau testified that she was told those skills were "a plus" and that some of the positions may require inputting information occasionally into a computer. TR 105.

The Employer also introduced a Workers' Compensation Commission Record of Employment Contacts completed by the Claimant as he conducted his job search activities. In this form, the Claimant indicated that he filled out applications with the following employers: George Moore Inc, Westerly Rhode Island (10/4/01), Garrity Industries, Ashaway, Rhode Island (10/10/01), Yardney, Pawtuck, Connecticut (10/10/01), Davis Standard, Stonington, Connecticut (10/10/01), Sheffield Lab, New London, Connecticut (10/10/01), Plas-Pak, Norwich, Connecticut

(10/19/01), Staffing Consultants, Inc., Norwich, Connecticut (10/19/01) and Blackstone Valley Security (12/4/01). RX 57.

The Claimant offered a December 18, 2001 vocational rehabilitation evaluation report authored by Carl Barchi, M.Ed., CDMS as rebuttal to Employer's labor market survey evidence. CX 60. In his report dated December 14, 2001, Mr. Barchi indicated that he interviewed the Claimant, reviewed his file and contacted the following employers listed in the Employer's labor market surveys: Blackstone Valley Security, Ace Security, Pinkerton Security, Professional Security, US Security Association and Wal-Mart. *Id.* With regard to the employer contacts, Mr. Barchi wrote,

> There were no currently-available security guard positions at any of the security firms noted above when contacted on December 12, 2001. Security positions that were formerly sedentary surveillance-type positions now tend to require regular standing, walking, climbing stairs and even driving due to the recent trend to expand basic job requirements. Individual companies continue to expect security guards to take on additional duties and so there is no guarantee that physical requirements will not change not only on a given assignment but also due to the regular rotations of guards from one company (account) to another. Mr. Green's lack of experience as a guard minimizes his chances of even being interviewed. The present competition for qualified guards is high, and both pay and expected performance levels have been gradually rising since the September 11 call for increased surveillance and security.

Id. at 3. In addition, Mr. Barchi observed that "[the Claimant's] personal appearance and interpersonal presentation style is compromised by his obesity and his reported constant, severe pain." *Id.* Based on these observations, the Claimant's restrictions and work history, and the negative results obtained from his employer contacts, Mr. Barchi concluded that the Claimant could not be placed in the competitive labor market. *Id.*

IV. Findings of Fact and Conclusions of Law

A. Nature and Extent of the Claimant's Disability

The Claimant seeks an award of permanent total disability benefits from the proposed date of maximum medical improvement, November 3, 2000, to the present and continuing. TR 14. "Disability" is an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . ." 33 U.S.C. §902(10). Thus, the concept of disability under the Act is economic as well as medical. *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). "The degree of disability in any case cannot be measured by

physical condition alone, but there must be taken into consideration the injured man's age, his industrial history, and the availability of that type of work which he can do." *American Mutual Ins. Co. of Boston v. Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970). A disability inquiry under the Act involves two questions: (1) whether the nature of a worker's disability is temporary or permanent; and (2) whether the extent of the disability is partial or total.

1. The Nature of the Claimant's Disability

Regarding the nature of the Claimant's disability, the parties have stipulated that the Claimant reached a point of maximum medical improvement for the knee injury on November 3, 2000, but dispute the permanency date for the back injury. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Cor*p., 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Seidel v. General Dynamics Cor*p., 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement. The determination of when maximum medical improvement is reached so that claimant's disability may be characterized as permanent is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumpin*g, 22 BRBS 87, 91 (1989). Further, a finding of permanency does not necessarily foreclose the possibility that a claimant's condition may change, only that the normal healing period has expired and the condition is lasting or indefinite in nature. *See Watso*n, 400 F.2d at 654-55.

I adopt, as fully supported by the medical evidence, the parties' stipulation that the Claimant reached maximum medical improvement with respect to his knee injury on November 3, 2000. The parties have not offered a stipulation on the date of maximum medical improvement from the back injury, and the Claimant's treating physician, Dr. Gaccione, did not address this question in his reports. However, the record shows that the Claimant underwent back surgery in January 1992, and Dr. Brown, the treating neurosurgeon, reported on January 19, 1993, one year after the surgery, that the Claimant had attained maximum medical improvement with a fifteen percent permanent partial impairment of the lumbar spine. RX 7 at 1. Based on Dr. Brown's uncontradicted opinion, I find that the Claimant's disability involving his back reached a point of maximum medical improvement on January 19, 1993 and, thus, has been permanent in nature since that time. I further find that the fact that the Claimant aggravated his back condition a number of years later when he slipped and fell in 1999 does not affect the determination that any disability related to the back had become permanent in January 1993.

2. The Extent of the Claimant's Disability

a. Ability to Return to Usual Employment

In a claim for disability compensation that is not based on the schedule of losses in section 8(c) of the Act, a claimant has the initial burden of establishing that he cannot return to his usual

employment. *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). A claimant's usual employment is defined as the regular duties the claimant was performing at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). To determine whether a claimant has carried his or her *prima facie* burden of establishing an inability to return to usual employment, the administrative law judge must compare the medical opinions regarding the claimant's physical limitations with the requirements of the claimant's usual work at the time of the injury. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988).

For the purposes of identifying the Claimant's usual employment, I find that the duties the Claimant was performing at the time of the more significant disabling injury to his knee were those of his usual employment. At the hearing, the Claimant testified that around the time of the knee injury in 1997, he was working as a welder in the area of the South Yard reactors, which required frequent climbing, crawling on steel and kneeling. The most recent work restrictions assigned by Dr. Gaccione on October 5, 2001 clearly would prevent the Claimant from working as a welder. These restrictions were to avoid bending, squatting, stooping, crawling, climbing, heights, kneeling, twisting, walking more than 1-2 hours per day, standing more than 1-2 hours, lifting over 10 pounds and pushing or pulling over 25 pounds. Similarly, the Employer's medical expert, Dr. Mariorenzi, assigned the Claimant work restrictions of no crawling, excessive climbing, kneeling or squatting and opined that he would not be capable of performing his welding duties. Given this consistent, uncontradicted medical evidence, I conclude that the Claimant has met his burden of establishing that he would be unable to perform his usual work as a welder.

b. Suitable Alternative Employment

Since the Claimant has established that he is unable to return to his former employment because of a work-related injury, the burden shifts to the Employer to demonstrate the availability of suitable alternative employment; that is, realistic job opportunities which the Claimant is capable of performing and which he could secure if he diligently tried. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991) (*Palombo*); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981) (*Gulfwide Stevedores*); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989). If the Employer does not carry this burden, the Claimant is entitled to a finding of total disability. *American Stevedores v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976); *Rogers Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986). To satisfy its evidentiary burden, "the employer does not have to find an actual job offer for the claimant, but must merely establish the existence of jobs open in the claimant's community that he could compete for and realistically and likely secure." *Palombo*, at 74, citing *Gulfwide Stevedores* at 1042-43. Once an employer satisfies its burden, a claimant may rebut the showing of suitable alternative employment by establishing "that he was reasonably diligent in attempting to secure a job 'within the compass of employment opportunities shown by the employer to be reasonably attainable and available.'" *Palombo*, at 74, quoting *Gulfwide Stevedores* at 1043.

The Employer's vocational evidence establishes that positions at Wal-Mart as a greeter have been in existence within the Claimant's geographic area since August 22, 2001. Ms. Corneau described the job duties of a greeter as "verbally greet[ing] customers as they arrive . . .

[a]ssist[ing] them in finding departments in the store [and] . . . [o]ccasional[ly] pushing the carriages inside the store." RX 56 at 5. In addition, Ms. Corneau reported that Wal-Mart utilizes greeters in two capacities: to greet customers and to check receipts as customers are leaving. *Id.* At the hearing, she testified that the position was within the Claimant's physical restrictions, including his need to avoid exposure to dust or smoke because of his asthma. I note that Ms. Corneau did not reference Dr. Gaccione's most recent work restrictions in her reports, but rather referred to Dr. Mariorenzi's restrictions for the knee condition and Dr. Willetts's 1999 restrictions for the back condition. However, I find that the combined restrictions assigned by Drs. Mariorenzi and Willetts are substantially the same in material respects to those identified by Dr. Gaccione, the treating physician. Moreover, Ms. Corneau testified that she reviewed the trial exhibits, which include Dr. Gaccione's 2001 work restrictions, and most importantly, she spoke with Wal-Mart's personnel manager, who indicated that a chair could be provided as a reasonable accommodation, which would enable the Claimant to sit or stand as his comfort required. Further, my review of the job description provided in the report and by Ms. Corneau's testimony reveals that the requirements of the greeter position would not violate Dr. Gaccione's restrictions, which are to avoid bending, squatting/stooping, crawling, climbing/heights, kneeling, twisting, walking more than 1-2 hours per day, standing more than 1-2 hours per day, lifting over 10 pounds or pushing/pulling over 25 pounds. Additionally, the position would not conflict with the Claimant's other restrictions to avoid the use of vibratory tools and exposure to dust or smoke.

With regard to the Claimant's vocational evidence offered to rebut Ms. Corneau's reports and testimony, I am not persuaded by Mr. Barchi's non-specific opinion that the Claimant is not employable because of his appearance, interpersonal deficiencies and disabled condition. Rather, I give greater weight to Ms. Corneau's testimony that the Claimant would be an attractive candidate for a prospective employer because of his longstanding work history with the Employer and attendant good work habits. On the other hand, I find that the Claimant has successfully demonstrated that the security guard positions identified by Ms. Corneau are not reasonably available based on Mr. Barchi's uncontradicted statement that he contacted the security firms and no sedentary surveillance-type positions were then available. Moreover, Ms. Corneau admitted on cross-examination that the security firms had not identified any specific positions or job sites where the Claimant could be placed. Consequently, I find that the Employer's labor market evidence is not sufficiently specific in terms of currently available positions to constitute suitable alternative employment. Finally, I find that the Claimant's testimony and the corresponding report documenting his job search activities do not rebut the Employer's showing of suitable alternative employment because the Claimant has not demonstrated that he applied for and was rejected by Wal-Mart for the greeter position. *C.f. Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986) (claimant may prevail if he demonstrates he diligently tried and was unable to obtain a job), *cert. denied*, 479 U.S. 826 (1986).

Based on my finding that the Employer has established that suitable alternative employment is and has been available since August 22, 2001, I conclude that the Claimant is entitled to a finding of permanent total disability for the period of November 3, 2000 through August 21, 2001 and permanent partial disability beginning on August 22, 2001.

B. Amount of Compensation Due and Employer Credits

Pursuant to section 8 of the Act, the amount of the Claimant's disability compensation is calculated from his average weekly wage. 33 U.S.C. §908. In cases involving a traumatic injury, the average weekly wage is calculated as of the time of injury for which compensation is claimed. 33 U.S.C. §910; *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 149 (1991); *Hasting v. Earth-Satellite Corp.*, 8 BRBS 519, 524 (1978), *aff'd in pertinent part*, 628 F.2d 85 (D.C. Cir.1980), *cert. denied*, 449 U.S. 905 (1980). The Employer offered the Claimant's payroll records for the one year prior to his knee injury, from April 27, 1996 to April 26, 1997, which show that the Claimant's earnings for that year divided by 52, amount to $909.68 per week. RX 41. In addition, the parties stipulated that the Employer has been paying total disability compensation based on an average weekly wage of $909.68. TR 11-12. The party contending actual wages are not representative bears the burden of producing supporting evidence. *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 1179 (9th Cir. 1976); *Riddle v. Smith & Kelly Co.*, 13 BRBS 416, 418 (1981). As the Claimant has not offered any contradictory evidence, I find that the applicable average weekly wage is $909.68 based on the evidence of his earnings for one year prior to the disabling knee injury.

I have concluded that the Claimant was under a permanent total disability from November 3, 2000 through August 21, 2001. Consequently, I find that the Claimant is entitled pursuant to section 8(a) of the Act to compensation for the claimed period of permanent total disability, November 3, 2000 through August 21, 2001, based on the average weekly wage of $909.68.

The Claimant's entitlement to compensation commencing August 22, 2001, is controlled by section 8(c)(21) of the Act which provides that in cases of permanent partial disability not covered by the schedule of losses "compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability." 33 U.S.C. §908(c)(21). Calculating the amount of compensation under section 8(c)(21) therefore requires a comparison of the Claimant's pre-injury average weekly wage with his post-injury wage-earning capacity. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 60 (2d Cir. 1989) (*LaFaille*). "Wage-earning capacity" refers to an injured employee's "ability to command regular income as the result of his personal labor." *Seidel v. General Dynamics Corp.*, 22 BRBS, 403, 405 (1989), quoting 2 Larson, *The Law of Workmen's Compensation* §57.51 at 10-164.64 (1987). With regard to determinations of wage-earning capacity, section 8(h) of the Act provides,

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard

> to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. §908(h). Since the Claimant has not secured alternate employment or been offered any post-injury work by the Employer, it is appropriate to use the earnings established for the suitable alternative employment on the open market to fix his wage-earning capacity. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39, 42-44 (1996). To ensure that the Claimant's wage-earning capacity is not distorted by inflationary factors, the wages shown to be presently available from suitable alternative employment must be converted to their equivalent at the time of injury. *LaFaille*, 884 F.2d at 61; *Kleiner v. Todd Shipyards Corp*., 16 BRBS 297, 298 (1984). Ms. Corneau reported that the Wal-Mart greeter position presently paid $6.75 per hour and had a 1997 equivalent salary of $5.75 per hour, which when multiplied by 40 hours amounts to $230.00 per week. I find that this fairly and reasonably represents the Claimant's post-injury wage-earning capacity. Based on this calculation, I find that the Claimant has suffered a loss of wage-earning capacity in the amount of $679.68 per week (the difference between his average weekly wage and his wage-earning capacity) and, pursuant to section 8(c)(21), he is entitled to permanent partial disability compensation at the rate of 66 2/3% of that difference, or $453.35 per week from August 22, 2001 to the present and continuing.

Since the parties have also stipulated that the Employer has previously paid periods of temporary total disability compensation, I find that the Employer is entitled to a credit in the amount of its prior voluntary compensation payments pursuant to section 14(j) of the Act. *Balzer v. General Dynamics Corp*., 22 BRBS 447, 451 (1989), *aff'd on reconsideration*, 23 BRBS 241 (1990); *Scott v. Transworld Airlines*, 5 BRBS 141, 145 (1976).

C. Entitlement to Special Fund Relief

The Employer has petitioned for Special Fund relief pursuant to 33 U.S.C. §908(f), and it seeks to limit its liability for disability compensation to a period of 104 weeks commencing in the Fall of 2000 when the Claimant's disability related to his knee injury became permanent. ALJX 1. Section 8(f) of the Act limits an employer's liability for permanent partial, permanent total disability and death benefits to a period of 104 weeks, after which compensation liability is assumed by a Special Fund established pursuant to 33 U.S.C. §944, when the disability or death is not due solely to the injury which is the subject of the claim. 33 U.S.C. §908(f); *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198, 200 (1949). To avail itself of relief under this provision, an employer or insurance carrier must file an application with the District Director (formerly the Deputy Commissioner) of the Department of Labor's Office of Worker's Compensation Programs (OWCP) pursuant to section 8(f)(3) which, as amended, provides:

> Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented

> to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. §908(f)(3). The record shows that the Employer submitted its application for Special Fund relief while the claim was pending before the District Director who was unable to make a determination. ALJX 2. Thus, the OWCP has not raised the section 8(f)(3) absolute defense. *Cf. Tennant v. General Dynamics Corp.*, 26 BRBS 103, 107 (1992) (where the absolute defense is asserted, the administrative law judge can not consider the merits of the employer's section 8(f) application before initially considering whether the request submitted to the district director was sufficiently documented as required by 20 C.F.R. §702.321).

Turning to the merits, an employer must meet three requirements to avail itself of section 8(f) relief. The first two requirements are: (1) the employee must have had a pre-existing permanent partial disability; and (2) the pre-existing disability must have been manifest to the Employer. *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 793 (2d Cir. 1992); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1305 (2d Cir. 1992) (*Luccitelli*). In cases involving a permanent partial disability, the third requirement is that an employer must show that the Claimant's disability is "materially and substantially" greater than would have resulted from the subsequent injury alone. 33 U.S.C. §908(f)(1). The "subsequent" injuries in the case for section 8(f) purposes are the April 22, 1997 injury to the left knee and the January 13, 1999 back injury. The Employer contends that the Claimant's prior knee injuries, including his knee surgery in the early 1970's, combined with the subsequent injuries in 1997 and 1999 to make his current disability materially and substantially greater than would have resulted from the subsequent injuries alone.

As discussed above, the record shows that the Claimant underwent kneecap removal surgery prior to working for the Employer and sustained a workplace injury to his left knee in 1982. Afterwards, while he was still working for the Employer, he treated with Dr. Eliot for knee problems in 1993 and 1994 after he nearly fell off a boat because of instability in his knee. On January 19, 1994, Dr. Eliot gave the Claimant a 20% permanent partial impairment rating of the lower extremity based on the 1982 injury alone. In addition, the Claimant was evaluated by Dr. Willetts in 1994 for left knee pain, and he provided the Claimant with a rating of 22% permanent partial impairment of the left lower extremity due to the patellar removal and 11% permanent partial impairment of the left lower extremity related to the 1982 injury. The record evidence also shows that the Claimant sustained a workplace injury to his back in 1991 and underwent surgery for a herniated disc in 1992. Afterwards, the Claimant's physician, Dr. Brown, gave him a 15% permanent partial disability rating for the lumbar spine. Based on this uncontradicted medical evidence, I find that the Employer satisfies the first requirement that the Claimant have a pre-existing permanent partial disability before sustaining the subsequent injuries.

Regarding the second requirement, the Benefits Review Board has held that, "[i]t is well established that a pre-existing disability will meet the manifest requirement of Section 8(f) if prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable." *Esposito v. Bay Container Repair Co.*, 30 BRBS 67, 68 (1996). The Claimant's 1982 knee injury and 1991 back injury occurred at work and were contemporaneously documented in the Employer's personnel medical records. RX 37; RX 40 at 6-7; CX 1; CX 6. Clearly, the Employer had actual knowledge of the Claimant's pre-existing condition prior to his subsequent injuries in 1997 and 1999. Therefore, I find that the Claimant's pre-existing permanent partial disability was manifest to the Employer.

Regarding the third requirement, the Employer's medical expert, Dr. Mariorenzi, opined that the Claimant's prior knee condition and his arthritic and pulmonary problems combined with his workplace injuries to make his current disability "materially and substantially greater" than with the injuries themselves. Dr. Mariorenzi's opinion is supported by the objective medical evidence, and there is no contrary medical evidence. Most notably, in a report to the Employer dated April 21, 1994, Dr. Willetts opined that the Claimant's knee condition at that time was a result of a combination of his 1982 work-related injury, a new injury in 1993 and his knee pathology prior to the 1982 injury which caused a medical discharge from the Navy in 1969 and a patellectomy in 1972. Accordingly, I find that the Employer satisfies the third and final requirement for Special Fund relief.

In view of my finding that the Employer has satisfied the requirements for Special Fund relief under section 8(f) of the Act, its liability for the Claimant's permanent disability benefits is limited to the maximum period of 104 weeks commencing on November 3, 2000 when the Claimant's disability reached maximum medical improvement and became permanent. 33 U.S.C. §908(f)(1).

D. Medical Care

An Employer found liable for the payment of compensation is additionally responsible pursuant to section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). An award of Special Fund relief under section 8(f) does not relieve an employer of its liability for a claimant's medical benefits pursuant to section 7(a). *Barclift v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 418, 421 (1983), *rev'd on other grounds sub nom Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295 (4th Cir. 1984). The parties have stipulated that the Employer has voluntarily paid for the Claimant's medical care in the past, and the Employer has not disputed its liability for continuing medical care. Accordingly, I will order that the Employer pay for any future medical treatment which may be reasonable and necessary for the Claimant's work-related injuries.

E. Interest on Unpaid Compensation

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). The Board has also concluded that inflationary trends in the economy render use of a fixed interest rate inappropriate to further the purpose of making claimant whole, and it has held that interest should be assessed according to the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

F. Attorney's Fees

Having successfully established his right to compensation and medical benefits, the Claimant is entitled to an award of attorneys' fees under section 28(a) of the Act. *American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976); *Ingalls Shipbuilding v Director, OWCP*, 920 F.2d 163, 166 (5th Cir. 1993). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and Order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. §702.132, and the Employer and Carrier will be granted 15 days from the filing of the fee petition to file any objection.

G. Conclusion

In sum, I have concluded that the Claimant is entitled to an award of permanent total disability compensation from November 3, 2000 through August 21, 2001 and an award of permanent partial disability commencing on August 22, 2001 to the present and continuing. I have further concluded that the Claimant's disability compensation is to be paid by the Employer for a period of 104 weeks, commencing on November 3, 2000, and by the Special Fund pursuant to section 8(f) of the Act after expiration of the Employer's 104 week liability. Since the Employer has previously paid temporary total disability compensation to the Claimant, I conclude that it is entitled to a credit in the amount of these past payments pursuant to section 14(j) of the Act. Finally, I have determined that the Employer is liable for reasonable medical care necessitated by the Claimant's work-related injuries, attorney's fees and interest on unpaid compensation.

V. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Employer, Electric Boat Corporation, shall pay to the Claimant, Alan L. Green, permanent total disability compensation pursuant to 33 U.S.C. §908(a) commencing November 3, 2000 and continuing through August 21, 2001 at the rate of $606.76 per week;

2. The Employer shall pay the Claimant permanent partial disability compensation benefits pursuant to 33 U.S.C. §908(c)(21) at the weekly compensation rate of $453.35 commencing August 22, 2001 and continuing thereafter for a period of 104 weeks beginning on November 3, 2000;

3. The Employer shall be allowed a credit pursuant to 33 U.S.C. §914(j) for prior payments of temporary total disability compensation;

4. After the cessation of payments by the Electric Boat Corporation, continuing permanent partial disability compensation benefits shall be paid, pursuant to 33 U.S.C. §908(f), from the Special Fund established at 33 U.S.C. §944 until further order;

5. The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries may require pursuant to 33 U.S.C. §907;

6. The Employer shall pay to the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid;

7. The Claimant's attorney shall file, within thirty (30) days of the filing of this Decision and Order in the office of the District Director, a fully supported and fully itemized fee petition, sending a copy thereof to counsel for the Employer who shall then have fifteen (15) days to file any objection; and

8. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts

DFS:dmd